(5)

No. 06-233

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether a sheriff's employee who retained overpaid wages and was subsequently terminated by the sheriff for good cause, has a right of action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), for unsubstantiated allegations of retaliation and violations of § 211(c) and § 207(k) of the FLSA that, even if actionable and provable, occurred outside of the applicable statute of limitations?

2. Whether a county's termination procedure for a sheriff's employee, which included written notice of intent to terminate prior to a hearing before the sheriff and a second hearing before a neutral hearing officer, provided more due process than is required under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)?

3. Whether a county's good faith attempt to provide judicial review of a sheriff's employee's termination through an ordinance, which was later determined by the Idaho Supreme Court to be ineffective, can form the basis for a due process claim given that the county's administrative process did not preclude the sheriff's employee from filing a lawsuit to address any perceived violations of due process?

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[1] Respondents disagree with Petitioner's characterization of the underlying facts and law applicable to this matter. As a result, Respondents have rephrased the questions presented to more accurately frame the issues before this Court.

QUESTIONS PRESENTED – Continued

4. Whether allegations of a misclassification of a sheriff's employee under 29 U.S.C. § 207(k) in an unrelated FLSA collective action lawsuit can form the basis for a state law fraud claim with respect to a different sheriff's employee who (i) was aware of the existence of the collective action, (ii) is outside the parameters of the collective action, (iii) is outside of the applicable statute of limitations, and (iv) did not properly allege fraud during the underlying proceedings?

5. Whether the Idaho Supreme Court suppressed due process by denying a petition for writ of certiorari when it had already reviewed three (3) related cases on appeal (brought by Petitioner) regarding the same subject matter?

6. Whether the statute of limitations for a 42 U.S.C. § 1983 claim begins to run on the date that a terminated sheriff's employee had actual knowledge her termination was final or whether it continues to run while the terminated sheriff's employee unsuccessfully seeks repeated redress through the judicial system for misperceived wrongs?

LIST OF ALL PARTIES

Petitioner:

Stacy A. Gibson

Respondents:

ADA COUNTY, a political subdivision of Idaho;

ADA COUNTY SHERIFF'S OFFICE;

VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as ADA COUNTY SHERIFF;

R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as LEGAL ADVISOR TO THE ADA COUNTY SHERIFF;

ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

DOES I thru X

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OPINION BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a) deciding three (3) related cases (Idaho Sup. Ct. Docket Nos. 29694, 30976, and 31553) is reported as *Gibson v. Ada County*, 133 P.3d 1211 (Idaho 2006). An order denying Petitioner's petition for writ of certiorari with the Idaho Supreme Court (Pet. App. 34a) was filed April 25, 2006.[2]

JURISDICTION

The opinion of the Idaho Supreme Court was entered on February 9, 2006. Pet. App. 1a. A petition for rehearing was filed by Stacy A. Gibson on March 2, 2006. A petition for writ of certiorari was filed by Stacy A. Gibson with the Idaho Supreme Court on March 22, 2006. Pet. App. 49a. An order denying the petition for writ of certiorari was entered on April 25, 2006. Pet. App. 34a. An order denying the petition for rehearing was entered on May 9, 2006. Pet. App. 32a.

Stacy A. Gibson submitted an application to Justice Anthony M. Kennedy for an order granting an additional sixty (60) days to file a petition for writ of certiorari on July 7, 2006. By letter dated July 12, 2006, Justice Kennedy extended the time to file a writ of certiorari to August 14, 2006. The petition for writ of certiorari was filed

[2] Petitioner also references a petition for writ(s) of mandamus regarding Idaho Sup. Ct. Docket No. 29968, which was denied by the Idaho Supreme Court on October 17, 2003. Pet. App. 156a. A review of the order denying the petition for writ(s) of mandamus would appear to be untimely as it is outside the ninety (90) day deadline set forth by 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the Supreme Court of the United States.

on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

Petitioner Stacy A. Gibson ("Gibson") was employed with the Ada County Sheriff's Office. *Gibson v. Ada County*, 72 P.3d 845, 846 (Idaho 2003).[3] At the time of her promotion to a jail technician in October of 1998, her salary increased to $1,550.00 per month.[4] *Gibson I* at 846. Gibson signed pay claim vouchers for each month between and including November 1998 and June 1999, which mistakenly indicated her monthly salary was $3,050.00 per month. *Gibson I* at 846. This resulted in an overpayment to Gibson of $8,528.89 in take-home pay over that eight-month period. Pet. App. 434a-37a, 439a-41a, 456a. Gibson did not bring this overpayment to the attention of anyone in authority at Ada County, nor did she take steps to correct the overpayment. *Gibson I* at 846; Pet. App. 250a.

Once the series of overpayments was discovered by Ada County, both an internal investigation and a criminal investigation were conducted by the Ada County Sheriff's

[3] Since the Idaho Supreme Court has previously reviewed the factual background of this matter in *Gibson v. Ada County Sheriff's Dept.*, 72 P.3d 845 (Idaho 2003) ("*Gibson I*"), which was not appealed to this Court and, therefore, not subject to further review, Respondents will attempt to cite to the court-established factual determinations to the extent possible. *See* Pet. App. 218a.

[4] Though the court correctly stated her pay increased to $1,550.00, it was supposed to increase to $1,575.00 per month. Regardless, Gibson was already paid an additional $294.32 on March 1, 2000, to correct the $25 difference, making this issue irrelevant. Pet. App. 456a.

Office. *Gibson I* at 846. Both investigations were conducted in a professional and respectful manner. Pursuant to the results of the internal investigation, the Ada County Sheriff's Office found that Gibson, by receiving and keeping wages not due or owing to her (i) conducted herself in such a manner as to be detrimental to the good order and discipline of the Ada County Sheriff's Office, (ii) made a materially misleading statement in an official report (her eight (8) pay claim vouchers), and (iii) conducted herself in a manner as to reflect unfavorably on the Ada County Sheriff's Office and herself.[5] Pet. App. 265a. On August 2, 1999, Gibson was given written notice of the Ada County Sheriff's intent to terminate her employment based on the above findings. *Gibson I* at 847; Pet. App. 265a-67a. Gibson appealed this decision and requested an informal hearing before the Ada County Sheriff. Pet. App. 260a-61a.

A pre-termination hearing was scheduled for August 23, 1999. Pet. App. 261a. Gibson did not attend this hearing, but was represented at the hearing by her attorney, Vernon Smith. Pet. App. 254a. In order to allow Gibson an opportunity to appear in person, the Ada County Sheriff and Mr. Smith agreed to continue the hearing and place Gibson on administrative leave without pay as of August 24, 1999. Pet. App. 254a. After the hearing was rescheduled five (5) more times due to Gibson's failure to appear, the hearing was finally held on December 20, 1999. Pet. App. 249a-50a. After the hearing, where Gibson was represented through her attorney, the

[5] Respectively, these are violations of Ada County Code § 1-7G-3.A(5), Ada County Code § 1-7G-3.A(20), and the Ada County Sheriff's Office Policy Manual, § 9.04.

Ada County Sheriff rendered his December 27, 1999 written decision (based on cause) to terminate Gibson's employment with the Ada County Sheriff's Office, which decision was appealed to the Ada County personnel hearing officer. Pet. App. 246a, 249a-50a.

After substantial discovery was conducted, a hearing was held with exhibits and testimony on January 25 and 26, 2000, which Gibson participated in with her counsel in front of the Ada County personnel hearing officer. *Gibson I* at 847. On February 15, 2000, the personnel hearing officer affirmed the Ada County Sheriff's decision to terminate Gibson's employment. *Gibson I* at 847.[6] Gibson subsequently appealed the personnel hearing officer's decision to the trial court, which affirmed the personnel hearing officer's decision on May 7, 2001. *Gibson I* at 847. Gibson then further appealed the decision to the Idaho Supreme Court, which dismissed the matter on May 28, 2003, on the grounds that the decision of the personnel hearing officer was not subject to judicial review. That decision was not appealed to this Court.[7]

Idaho Sup. Ct. Docket No. 29694 (Gibson II)[8]

On July 19, 2002, Gibson filed a complaint alleging various offenses by Ada County, the Ada County Sheriff's

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[6] Though *Gibson I* states the date as February 17, 2000, Gibson admits the correct date is February 15, 2000. *See* Gibson's petition at 10.

[7] Neither was the decision in *Gibson v. Ada County*, 69 P.3d 1048 (Idaho 2003), which denied Gibson's request to have certain exempt documents relating to this matter disclosed.

[8] In the interest of efficiency, various motions filed by Gibson that are not essential for purposes of addressing this writ of certiorari have not been referenced in the various procedural histories.

Office, Vaughn Killeen, R. Monte MacConnell, Arville Glenn, and Scott Johnson (together "Ada County"), including civil rights violations under 42 U.S.C. §§ 1981, 1983, and 1985(3). In response, Ada County filed a motion to dismiss. On February 19, 2003, the district court found in Ada County's favor and determined the two-year statute of limitations had run, that the complaint did not allege facts supporting a claim for racial discrimination, and that no notice of tort claim had been filed, which barred any state common law tort actions. Pet. App. 212a-13a. On March 5, 2003, Gibson subsequently brought a motion to reconsider, which was denied on April 18, 2003.

Gibson then filed a notice of appeal with the Idaho Supreme Court on May 30, 2003. Thereafter, Gibson filed a second untimely motion to reconsider with the district court on June 9, 2003, which was denied on August 28, 2003. While the matter was pending before the Idaho Supreme Court, Gibson filed a motion to remand the matter back to the district court. The motion to remand was denied by the Idaho Supreme Court on January 7, 2004. The Idaho Supreme Court reviewed the issues and arguments that were presented by the parties and affirmed the decision of the district court on February 9, 2006.

Idaho Sup. Ct. Docket No. 30976 (Gibson III)

On June 4, 2003, Gibson submitted to the Board of Commissioners of Ada County (the "Board") a petition for hearing and review of her termination. By letter dated July 2, 2003, the Board informed Gibson that Idaho law precluded it from overruling the Sheriff's decision to terminate Gibson. Pet. App. 216a. Despite the lack of authority to submit the petition to the Board or to have

the Board act on it, Gibson nevertheless filed a subsequent petition for judicial review with the district court (naming Ada County and the Ada County Sheriff's Office (together "Ada County")) and a motion to remand to the Board, claiming that the Board's refusal to grant Gibson a hearing was an action reviewable by the district court. The petition and motion to remand were denied by the district court on February 27, 2004, and reaffirmed on June 17, 2004. Pet. App. 146a, 139a.

Gibson filed a notice of appeal with the Idaho Supreme Court on July 28, 2004. The Idaho Supreme Court reviewed the issues raised by Gibson, including whether she was entitled to a declaratory judgment and whether the Board had authority to grant her a hearing. The court affirmed the decision of the district court and determined that because Gibson had failed to cite a statute that authorized the Board to review her termination, and because the court had no authority to issue a declaratory judgment, Gibson's appeal was brought frivolously, unreasonably, and without foundation and awarded attorney fees and costs to Ada County on February 9, 2006.

Idaho Sup. Ct. Docket No. 31553 (Gibson IV)

On November 7, 2001, Ada County filed a complaint seeking repayment of the $8,528.89 mistakenly overpaid to Gibson between November 1998 and June 1999 while she was an employee of the Ada County Sheriff's Office. On May 7, 2002, Gibson filed a counterclaim and then later moved to amend her counterclaim to include an additional cause of action under the Fair Labor Standards Act. On February 19, 2003, the district court denied Gibson's motion to amend. Pet. App. 214a. After further consideration, the district court determined that Gibson

could file an amended counterclaim purely as a matter of right, but not for purposes of bringing FLSA claims, which it had already determined were without merit. Pet. App. 188. Nonetheless, Gibson filed an amended counterclaim adding various claims under the FLSA. Pet. App. 474a. On September 16, 2004, the district court dismissed Gibson's amended counterclaim on the grounds that Gibson's FLSA claims were inapplicable and her tort claims were barred by statute. Pet. App. 132a. Ada County then moved for summary judgment on its claim of unjust enrichment, which was granted on December 10, 2004. Pet. App. 88a.

Gibson appealed to the Idaho Supreme Court on January 27, 2005. Though Gibson did not argue against the unjust enrichment claim, she believed she was entitled to offsets to the $8,528.89 granted to Ada County by the district court. After reviewing the issues and arguments, the court determined that an overpayment of wages is not a violation of the FLSA and that Gibson had otherwise failed to provided evidence that she was entitled to any reduction in the amount awarded to Ada County. On February 9, 2006, the court awarded Ada County its costs and attorney fees because it found that Gibson failed to properly address the basis of the district court's decision and that Gibson's attempt to ask the court to second guess factual determinations was frivolous, unreasonable, and without foundation.

U.S. Court of Appeals for the Ninth Circuit, Docket No. 06-35600 (Gibson V)

Though this matter is currently pending before the Ninth Circuit and not on appeal to this Court, its close relation to the cases on appeal warrants a short summary.

On July 5, 2005, Gibson filed a complaint in the United States District Court against Ada County, the Ada County Board of Commissioners and the Ada County Sheriff's Office alleging a civil rights action pursuant to 42 U.S.C. § 1983 for incidents that allegedly occurred in relation to her employment termination from the Ada County Sheriff's Office. Given the matter's similarity to the allegations already brought by Gibson in state court, the Ada County defendants filed a motion to dismiss, which was granted on March 1, 2006, on the basis of issue/claim preclusion and the expiration of the § 1983 statute of limitations on February 15, 2002. *Gibson v. Ada County*, No. CV 05-263-S-EJL, 2006 WL 507955 (D. Idaho, March 1, 2006).

Gibson subsequently submitted approximately 1700 pages of post-judgment filings, including a motion to alter or amend judgment and a motion to amend pleadings. On June 6, 2006, the district court determined that the filings merely mirrored the evidence already before the court and did not justify further relief. The court also determined that the request to amend pleadings was untimely because judgment had already been entered against Gibson. Lastly, the court determined that the post-judgment filings were unreasonable and awarded the Ada County defendants their costs and attorney fees. *Gibson v. Ada County*, No. CV 05-263-S-EJL (D. Idaho, June 6, 2006). Res. App. 1a.

On July 3, 2006, Gibson filed a notice of appeal to the Ninth Circuit. Gibson's appellate brief is currently required to be submitted by October 19, 2006.

Petition for Writ of Certiorari – Idaho Sup. Ct. Docket Nos. 29694/30976/31553

On March 22, 2006 (after the Idaho Supreme Court and the Federal District Court had ruled adversely against Gibson with respect to *Gibson II, III, IV,* and *V*), Gibson submitted a petition for writ of certiorari with the Idaho Supreme Court to undertake a review of Ada County's actions with respect to *Gibson I, II, III,* and *IV*.[9] Pet. App. 49a. After reviewing Gibson's arguments, the Idaho Supreme Court denied the petition. Pet. App. 34a.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States explains, "a writ of certiorari will be granted only for compelling reasons." The rule sets forth certain considerations used in making such a determination, including when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10(b)(c).

[9] As previously noted above, *Gibson I* was decided in 2003 and is, therefore, outside the scope of further review.

In the instant action, Gibson's petition fails to establish that either of these standards has been met. The Idaho Supreme Court's rulings do not conflict with any other state or federal court decisions. Furthermore, the Idaho Supreme Court has not decided a federal question that should be settled by this Court or decided a federal question in a way that conflicts with any relevant decisions of this Court.

Idaho Sup. Ct. Docket No. 29694 (Gibson II)

In its decision, the Idaho Supreme Court determined that (i) all of Gibson's tort-based claims were properly dismissed due to her failure to file a notice of tort claim, (ii) all of Gibson's 42 U.S.C. §§ 1981 and 1985 claims were properly dismissed due to her failure to allege any facts suggesting a conspiracy to discriminate on the basis of race or class, and (iii) Gibson was not required to exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 claim. In her petition, Gibson does not dispute the first two rulings but does appear to argue that she was required to exhaust administrative remedies prior to filing a § 1983 civil rights action. However, this Court has already held that exhaustion of administrative remedies is not a prerequisite to filing a § 1983 claim. *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982); *Ellis v. Dyson*, 421 U.S. 426 (1975). As a result, Gibson cannot use administrative remedies as an excuse for missing the statute of limitations.[10]

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[10] It appears Gibson was already aware of this as evidenced by the fact that she filed her § 1983 claims in 2002, prior to the Board's determination in 2003 that it could not grant her petition for review, which Gibson claims was her final attempt at an administrative remedy.

In certain circumstances, an agency's decision may need to be ripe for review to trigger the statute of limitations. *See Raper v. Lucey*, 488 F.2d 748, 750 n. 3 (1st Cir. 1973).[11] However, that trigger occurred no later than February 15, 2000, when the hearing officer affirmed Gibson's termination. As a result, the statute of limitations expired no later than February 15, 2002, which is more than five (5) months before Gibson's July 19, 2002 complaint in this matter. Though not clear, it appears that in her petition Gibson argues that the statute of limitations for her § 1983 claim was tolled while the possibility of criminal prosecution against her existed and/or also tolled until July 2, 2003, when the Board informed her it could not grant her petition for review.[12] Both of these theories are misplaced.

The criminal prosecution issue was not raised at the district court level. As a result, the Idaho Supreme Court was precluded from reviewing it. *See State v. Fodge*, 824 P.2d 123, 126 (Idaho 1992). Even if this issue had been properly presented, it is still without merit. The cases cited by Gibson are not relevant to the current situation.[13] The cited cases deal with instances where criminal charges

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[11] Gibson cites *Pounds v. Denison*, 766 P.2d 1262 (Idaho 1988), for this proposition. However, that case only applies in situations where an administrative remedy is provided by statute, which is not the case here.

[12] In her briefing for the Idaho Supreme Court, Gibson also argued that Ada County's alleged violations of the FLSA and Gibson's due process rights also tolled the statute of limitations, though she has not clearly articulated such arguments in her petition. Regardless, Ada County discusses the inapplicability of Gibson's FLSA and due process claims later in this brief.

[13] *See Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017 (E.D. Cal. 2004); *Heck v. Humphrey*, 512 U.S. 477 (1994).

were brought against an individual. No criminal charges were ever filed against Gibson.[14] Even if they had been, under the case authority she provides, the only claim periods that would potentially be tolled would be those that directly dealt with violations of civil rights as a result of the criminal prosecution. Nothing in these cases stands for the proposition that the mere possibility of the filing of criminal charges tolls all potential civil rights claims.

With regards to her second tolling theory, existing authority holds that the two-year statute of limitations in situations like Gibson's begins to run on the day the harm is known. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980) (denial of tenure, not the expiration of a one-year terminal contract given to the plaintiff on the day his tenure was denied, was the alleged discriminatory act commencing the running of the statute of limitations); *see also, Chardon v. Fernandez*, 454 U.S. 6 (1981) (statute of limitations for terminated employee commenced on the date they received notice of their impending termination, not the later date on which the termination became final).

In *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991), the court faced a situation different from both *Ricks* and *Chardon* in that the action challenged was the denial of a pre-termination hearing and procedural due process. The court held that because the plaintiff would not know that the decision was final and that no further process was forthcoming until he was actually terminated, the statute of limitations began to run on the

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[14] The Canyon County Prosecuting Attorney's Office (reviewing the matter because of the potential conflict) determined a civil, rather than criminal, action against Gibson was more appropriate. Pet. App. 259a.

date of his termination. In the current matter, Gibson exhausted her administrative remedies no later than February 15, 2000, which is the date the personnel hearing officer rendered his decision regarding Gibson's employment termination. As a result, the statute of limitations expired on February 15, 2002. *See Henderson v. State*, 715 P.2d 978 (Idaho 1986) (the statute of limitations for judicial review of the termination of a state employee commences upon the personnel commission's final decision).

In *Henderson*, the court found that even with the right to judicial review of the Idaho personnel commission's final decision embedded in the statute, the plaintiff had exhausted his *administrative* remedies once the personnel commission rendered a final decision. *Id.* at 980. In this case, Gibson had exhausted her administrative remedies once the personnel hearing officer rendered his decision on February 15, 2000. The *Henderson* court went on to hold that the "last act" in terminating the plaintiff's employment was the personnel commission's decision, and that "last act" occurred on the day the personnel commission rendered its decision, thus commencing the running of the statute of limitations. *Id.* at 981. Under the guidance of *Henderson*, the "last act" of Ada County in terminating Gibson's employment was the decision of the personnel hearing officer. Thus, the statute of limitations commenced upon the rendering of that decision.

There is further support for this argument in federal case law. In *Halpern v. Bristol Bd. of Educ.*, 52 F. Supp. 2d 324, 329 (D. Conn. 1999), the District Court for the District of Connecticut, on similar relevant facts as the present case, held that "[i]n the context of wrongful termination where violations of civil rights are asserted, the

limitations period begins to run when the employee receives notice that the adverse decision has been made." Also, it found that § 1983 claims accrue when the conduct causes the harm and the claimant knows or has reason to know of the conduct and resulting harm. *Id.* The court went on to find that "[t]he reference to knowledge of the injury does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendant's acts were wrongful." *Id., citing Veal v. Geraci*, 23 F.3d 722, 724 (2nd Cir. 1994). Similarly, in *Kelly v. City of Chicago*, 4 F.3d 509 (7th Cir. 1993), the Seventh Circuit Court of Appeals held that the statute of limitations for a § 1983 action, based upon the revocation of a liquor license, accrued upon the notice of revocation rather than upon enforcement of the decision after judicial review of the revocation. Discussed in all of these cases is the fact that the plaintiffs were not barred from commencing their civil rights actions until after state administrative or judicial proceedings ended and each could have brought their action from the moment of the alleged wrongful act and injury.

The present case is similar. Gibson certainly could have brought her civil rights actions immediately after the alleged wrongful acts of Ada County. Redress for these alleged wrongs was not dependent upon any level of administrative or judicial review. Civil rights actions are independent creatures by their very nature. Gibson simply slept on her rights and is attempting to use a judicial appeal process as a method by which to revive that expired right. It is worth noting that not only did the Idaho Supreme Court reach this conclusion, but a federal district court similarly determined that "Gibson either knew or should have known of the injury giving rise to her § 1983

cause of action on February 15, 2000 . . . " and that her repeated requests for review do not toll her statute of limitations. *Gibson v. Ada County*, No. CV 05-263-S-EJL, 2006 WL 507955, *6 (D. Idaho, March 1, 2006).

Idaho Sup. Ct. Docket No. 30976 (Gibson III)

In this matter, the Idaho Supreme Court ruled that (i) Gibson failed to demonstrate that her petition for judicial review of the Board's non-action with respect to her request for a hearing was allowed by statute or constitutional authority,[15] (ii) Gibson's motion to remand the matter to the Board was nonsensical given the Board's lack of authority to review the Sheriff's termination decision,[16] and (iii) Gibson's request for a declaratory

[15] Under Rule 84(a)(1), I.R.C.P., "[a]ctions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute." Pet. App. 418a. Thus, before judicial review is proper, there must be a statute that expressly authorizes review of the specific action in question. In the case at hand, Gibson failed to identify any statute that allows judicial review of the Board's non-action regarding the petition. The Idaho Supreme Court also noted that, contrary to Gibson's contention, *Gibson I* did not provide an alternate basis for review of the Sheriff's decision. Pet. App. 20a.

[16] There is no process by which a board of county commissioners may review an employment decision of another elected county official. The elected officers of Idaho counties are granted the constitutional authority to appoint deputies. Idaho Const. Art. XVIII, § 6. Pet. App. 412a. The Idaho Supreme Court held that while a board of county commissioners may adopt a classified personnel system which limits the unfettered dismissal of the classified employee of another elected official (*Hansen v. White*, 762 P.2d 820 (Idaho 1988)), it is the various elected officials who are given the constitutional authority to determine who shall hold the position of deputies in their offices. *Barth v. Canyon County*, 918 P.2d 576 (Idaho 1996). The court also found, "[t]he framers . . . decided that it would be best to give the sheriff the power to appoint deputies 'without giving power to the county commissioners to interfere.'"

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judgment as to the constitutionality of certain Ada County ordinances and her entitlement to reinstatement and back pay was improper.[17] Gibson does not appear to directly dispute the Idaho Supreme Court's rulings and, instead, argues that she was not terminated for good cause and somehow deprived of due process. Though such arguments were not properly before the court, Ada County will address them for this Court's benefit.

Members of Ada County's classified service may be dismissed from employment or otherwise disciplined for good cause. Ada County Code § 1-7G-3 (Pet. App. 346a). However, before such a deprivation of property interests can be imposed, the employee has certain rights. When

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Id. at 580, citing 2 Proceedings and Debates of the Constitutional Convention of Idaho at 1819.

The *Hansen* case discusses the implied power of removal along with the constitutionally granted power to appoint. *Hansen* at 825. That case does not take away the sheriff's power to remove his own deputies, but limits that right by requiring cause for dismissal if the board has enacted a classified personnel system that requires cause for dismissal. In this case, the Board enacted a classified personnel system. That system, found in the Ada County Personnel Ordinance, Ada County Code Title 1, Chapters 7 and 11, limits dismissing classified employees to instances where cause is found. The Ada County Sheriff had the authority to determine whether cause was found in dismissing Gibson, which he did. The Board cannot "review" the Sheriff's determination in this matter.

As a result, it makes no sense to expect that a remand to the Board will create a record for review. At most, the only record that can exist is the July 2, 2003 letter from the Board to Gibson's counsel explaining its inability to grant the hearing that Gibson requests. *See* Pet. App. 216a. Since the Board cannot grant a hearing, no purpose is served by remanding the matter back to the Board.

[17] Idaho Code § 67-5272(1) requires a proceeding for declaratory judgment be instituted at the district court level, which Gibson failed to do.

serious employee discipline is contemplated, the Ada County Code requires the elected official in charge of the subject employee to provide the employee with a written notification of contemplated action, including a statement of the charges, allegations or inadequacies, and the evidence the action is based upon. Ada County Code § 1-7G-3B (Pet. App. 350a). The contemplated action cannot become effective until five (5) days from the date the employee receives the written notification. In those five (5) days, the employee is given the right to appeal the contemplated action to the elected official. Ada County Code § 1-7G-3C (Pet. App. 351a). The elected official then must give the employee an opportunity to respond to the allegations made. Ada County Code § 1-7G-3D (Pet. App. 352a).[18]

In the present case, the Ada County Sheriff followed all of the above procedures. Gibson was sent a notice of intent to terminate on August 2, 1999, setting forth the grounds for termination. Pet. App. 265a. Because of her alleged emotional difficulties, the Sheriff even extended to Gibson five (5) opportunities to respond to the allegations over a four-month period. Pet. App. 250a. It was not until after conducting a hearing on December 20, 1999, where Gibson was represented by her attorney, that the Sheriff determined that cause existed to terminate her. Pet. App. 249a. Gibson was then given a full evidentiary hearing on January 25 and 26, 2000, in front of a neutral hearing

[18] In her Petition, Gibson appears to attack Ada County Ordinance No. 612, which amends many provisions of Ada County Code Title 1, Chapter 7. *See* Pet. App. 399a. However, Gibson has not explained how she would have standing to make any claims regarding an ordinance that was enacted in 2006, many years after her employment termination.

officer who affirmed the Sheriff's decision on February 15, 2000. As a result, Gibson was provided proper due process.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985), this Court stated that "[t]he essential requirements of due process . . . are notice and an opportunity to respond." In *Loudermill*, this Court addressed the question of what level of due process should be afforded to public employees during their termination. This Court held that all the process that is due in an employment termination is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by state statute. *Id.* at 547-48. In the matter at hand, Gibson was given written notice of the Sheriff's intent to terminate her and then afforded both a pre-termination hearing with the Sheriff and second hearing with a neutral hearing officer. As a result, Gibson was not deprived of due process. Since the Idaho Code does not provide for any administrative procedures in this type of situation, Ada County, through Ada County ordinances, attempted to give Gibson more process than she was due by holding a hearing presided over by a neutral hearing officer, who affirmed her termination.

Gibson nonetheless argues that she has been deprived of due process. She cites a number of Idaho cases dealing with due process; however, none of them deal with employment termination and, more importantly, the cases dealt with situations where a statute already provided for judicial review, which is not the case here.[19] Essentially,

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[19] *See State v. Finch*, 315 P.2d 529 (Idaho 1957); *Foster v. Walus*, 347 P.2d 120 (Idaho 1959); *State v. Concrete Processors, Inc.*, 379 P.2d 89 (Idaho 1963); *Electors of Big Butte Area v. State Bd. of Educ.*, 308 P.2d 225 (Idaho 1957).

Gibson is attacking Ada County for attempting to provide her with more due process than Ada County could under the law. Since the legislature has not provided for another procedure, the Idaho Supreme Court's decision in *Gibson I* effectively tied Ada County's hands with regards to this matter. Gibson's continual reliance on a petition for judicial review is misplaced. Where the legislature has not provided for a statutory method of reviewing an elected official's termination decision, no right to an appeal exists. *See Daw ex rel. Daw v. Sch. Dist. 91 Bd. of Tr.*, 41 P.3d 234, 235 (Idaho 2001) (a party does not have the right to seek judicial review under the Idaho Administrative Procedure Act where there is no statute that expressly provides for an appeal to district court); *see also Young v. Bd. of Comm'rs of Twin Falls County*, 177 P.2d 162, 165-66 (Idaho 1947) (appeals are statutory and if the legislature did not provide for an appeal, no right of appeal exists). In light of this, the trial court proposed various alternatives that Gibson might be able to pursue if she believed she was wronged, including providing Gibson leave to amend to include common law claims, if applicable. Pet. App. 148a. However, Gibson did not exercise her leave to amend and, instead, sought ways to appeal the trial court's order denying her petition. Pet. App. 141a.

Idaho Sup. Ct. Docket No. 31553 (Gibson IV)

In its decision, the Idaho Supreme Court affirmed that summary judgment was proper on Ada County's claim against Gibson for unjust enrichment in the amount of $8,528.89 for overpayments she retained and that the amount by which Gibson was unjustly enriched was not subject to reasonable dispute. Though Gibson never argued against the finding of unjust enrichment, she does claim that she is entitled to relief under the FLSA that

would offset the amount awarded to Ada County. However, she only makes vague references to monies she mistakenly alleges she is entitled to under the FLSA, without providing any credible evidence to support her contentions. In addition, Gibson continues to ignore the fact that any alleged FLSA claims are inapplicable to this matter since (i) an overpayment of wages by Ada County is not a violation of the FLSA, (ii) Gibson does not meet the standards for a retaliation claim under the FLSA, and/or (iii) the FLSA statute of limitations has expired.

Gibson's retaliation argument is convoluted and unsupported by existing law. It is apparently based on the theory that her receipt of overpayments of $8,528.89 in take-home pay each month between and including November 1998 and June 1999 was a violation of the FLSA. However, a mistaken overpayment by an employer is not a violation of § 211(c) of the FLSA.[20] Gibson has cited no law

[20] Gibson also appears to claim that she was misclassified under § 207(k) of the FLSA. However, instead of offering proof of any such violation involving her, she relies on the misstated facts of three cases involving Ada County. In the first of these, *Woodbridge v. County of Ada*, No. 95957 (Idaho 4th Dist. Ct., Ada County), the district court did not find that Ada County had violated § 207(k). *Gallagher v. Ada County*, No. CV OC 0202022D (Idaho 4th Dist. Ct., Ada County, 2004) did not involve an employee of the Ada County Sheriff's Office, let alone a jail technician, as was Gibson's position. Lastly, *Knickerbocker v. Ada County*, No. CV 04-288-S-BLW (D. Idaho), is an ongoing collective action under the FLSA that is limited in scope to jail technicians employed by the Ada County Sheriff's Office between June 8, 2001, and June 8, 2004, which is well after Gibson's tenure as an employee. Furthermore, the matter has only recently reached the certification stage and no determinations have been made regarding the merits of the plaintiffs' claims. Pet. App. 420a-23a. The existence of this case cannot form the basis of a state fraud claim since Ada County has not admitted to or been found by a court to have misclassified any jail technicians under § 207(k) during the time period of Gibson's

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to support her contention. Furthermore, § 216(b) does not provide an employee a private right of action for a violation of § 211(c). Gibson's failure to provide applicable authority on this issue is sufficient reason to deny her retaliation claims, however, there are several other reasons why her FLSA claims are misplaced.

To begin with, Gibson's claims of retaliatory action in violation of the FLSA are logically impossible given the timeline of events involved in this matter. Gibson appears to argue that she has a claim for FLSA violations under 29 U.S.C. § 215(a)(3), which states that it is unlawful:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . .

It is unquestioned that Gibson did not file a complaint with or otherwise institute a proceeding with any supervisory entity (*e.g.*, the Department of Labor) prior to her termination. In *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999), the Ninth Circuit Court of Appeals expanded the phrase "filed any complaint" to include communications by an employee to an employer "so long as an

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employment. Furthermore, a state law fraud claim that was not properly allegedly during the underlying proceedings is not applicable for review.

Gibson also refers to a 1997 memorandum from the Sheriff's legal advisor regarding the potential use of the § 207(k) exemption at the Boise State University substation, but this has little to do with use of the § 207(k) exemption at the Ada County jail where Gibson worked. Pet. App. 275a.

employee communicates the substance of his allegations to the employer (*e.g.*, that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage) . . . " Nevertheless, Gibson is unable to demonstrate that even that criteria has been met.

In this case, Gibson never raised an issue of not being paid adequate overtime until well after December 27, 1999. As such, § 215(a)(3) is not applicable. Nonetheless, Gibson seems to argue that her alleged "complaints" (which are not properly substantiated in the record), about minor administrative errors in the past somehow qualify as a "complaint" within the meaning of § 215(a)(3). Not only is this conclusion unsupported by existing law, it is absurd to believe that it can form the basis of a retaliatory claim since Gibson was not and has not alleged that she was discharged or otherwise discriminated against for bringing these alleged "complaints."

Gibson does seem to allege that all action taken by Ada County beginning July 20, 1999, involving her was retaliatory in nature. July 20, 1999, was the date on which Gibson was interviewed pursuant to an internal investigation by the Ada County Sheriff's Office regarding her failure to bring her overpayment to the attention of anyone in authority at Ada County or to take steps to correct the overpayment.[21] However, Ada County has

[21] Gibson also makes an unsubstantiated claim of retaliation through a threat of criminal prosecution after "she served her request for a *Loudermill* hearing . . . " but Gibson does not properly set forth the basis for any such claim and, even if she could, it cannot be considered retaliation under the FLSA since Gibson had not alleged any FLSA violations at that point in time. *See* Gibson's petition at 9. Similarly, Gibson has also claimed she suffers from post-traumatic stress disorder, but fails to mention that the validity of her medical claims are still the

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always maintained that the overpayment was a result of a mistake on its part. As a result, there was never an attempt by Ada County to shift any record-keeping responsibilities to Gibson. What Ada County did find fault with was Gibson's conduct in keeping these funds (which have yet to be returned to Ada County) and in failing to report the overpayment. It was these actions that led to her termination.

In order to have a claim for retaliation under § 215(a)(3), Gibson must be able to show that (i) she complained to Ada County about inadequate overtime payment prior to her termination and (ii) that the immediate cause or motivating factor of her discharge was her assertion of statutory rights. *See Lambert* at 1008; *see also, Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). As discussed above, Gibson never "complained" about overtime payments until after her termination proceedings began. Though Gibson appears to contend that she did assert statutory rights, there is nothing in her pleadings that clearly indicates what those statutory rights were. The Ninth Circuit has held that "not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3)." *Lambert* at 1007.

Even if it was somehow conceivable that Gibson made a valid "complaint," she must also demonstrate that such a "complaint" was the immediate cause or motivating factor for her discharge. Her discharge was based on the determination by the Ada County Sheriff that Gibson, by

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subject of another pending lawsuit. *See Gibson v. Ada County Sheriff's Office*, No. 01-015332, Indus. Comm'n, Idaho.

receiving and keeping the overpayments not due or owing to her, violated Ada County Code § 1-7G-3.A(5) in that she conducted herself in such a manner as to be detrimental to the good order and discipline of the Ada County Sheriff's Office and § 1-7G-3.A(20) in that she knowingly made a materially misleading statement in an official report (her eight (8) pay claim vouchers). The Ada County Sheriff also found that Gibson violated the Ada County Sheriff's Office Policy Manual, Section 9.04, in that she conducted herself in such a manner as to reflect unfavorably on the Ada County Sheriff's Office and herself. On February 15, 2000, a neutral personnel hearing officer affirmed the Ada County Sheriff's decision to terminate Gibson's employment. Gibson has not offered any other credible evidence regarding why she was terminated. It is clear why Gibson was terminated and the reasons had nothing to do with any alleged "complaint" made by her to Ada County.

Even if Gibson did have a basis for bringing FLSA claims, the statute of limitations for filing such claims lapsed. The statute of limitations applicable to the FLSA is found in the Portal-to-Portal Pay Act, 29 U.S.C. § 255. This states that an action to enforce a cause of action under the FLSA must be commenced within two (2) years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three (3) years after the cause of action accrued.

Going back to the date that Ada County initiated this action, November 7, 2001, the earliest date from which Gibson could possibly have a valid claim is November 7,

1999,[22] which is more than three (3) months after the July 20, 1999 date put forth by Gibson. As such, all of her alleged claims under the FLSA relating to events that took place prior to November 7, 1999, must be summarily dismissed including, but not limited to, all claims related to (i) any alleged failure to pay her overtime, (ii) her interviews by Ada County Sheriff's Office personnel, (iii) her receipt of overpayments, (iv) placement on leave without pay, and (v) any alleged record keeping violations with respect to her. Since the November 7, 1999 date occurs after the events complained about, it is unclear how she can argue that she has valid FLSA claims.

Though Gibson may argue that such actions are willful and extend the statute of limitations to three (3) years, there is no evidence to support that contention. Since Gibson's violations are based on the conclusion that an overpayment is a violation of the FLSA, it logically follows that in order for a willful violation to exist, Gibson must be able to demonstrate that the overpayment made to Gibson was purposeful. Such a contention is absurd and has never been alleged by either of the parties.

[22] Ada County does not concede that the statute of limitations for Gibson's counterclaims relates back to the filing of Ada County's complaint. If the May 7, 2002 date of the filing of Gibson's original counterclaim is used as contemplated by 29 U.S.C. § 216(b) ("no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"), the FLSA statute of limitations would only extend back to May 7, 2000, which is almost an additional six (6) months later.

The Idaho Supreme Court denied Gibson's petition, presumably because it had already reviewed Gibson's claims in *Gibson I, II, III,* and *IV*. Gibson cites cases for the proposition that a writ of certiorari to a New Mexico trial court is proper when there is no statutory authorization for an appeal of an agency decision to the trial court.[23] However, it is not clear what such holdings have to do with the case at hand since Gibson did not submit a writ of certiorari to a New Mexico trial court. These cases do not stand for the proposition that a writ of certiorari can be submitted directly to a state supreme court, let alone one outside New Mexico, as Gibson has done here.

CONCLUSION

The petition for writ of certiorari and all other relief should be denied.

Furthermore, despite repeated direction from several state and federal courts that her arguments are without merit, Gibson continues to rely on those same arguments without providing any additional persuasive law or bringing into doubt the existing law on which the courts based their decisions. In addition to misconstruing case law and making arguments based on inapplicable cases, she has also gone out of her way to complicate this matter by filing

[23] *See McNulty v. Sandoval County*, No. Civ. 05-221-BB/ACT (D. New Mexico, August 15, 2005); *Terlecky v. City of Ruidoso Downs*, No. Civ. 04-1121, BB/DJS (D. New Mexico, January 24, 2006); and *Zamora v. Village of Ruidoso Down*, 907 P.2d 182 (N.M. 1995).

repetitive actions and unauthorized motions. Ada County has expended much time and effort in repeatedly dealing with this matter and related matters brought by Gibson.

Gibson and her counsel have submitted her petition frivolously and made arguments not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Therefore, Ada County requests this Court explore the application of Supreme Court Rule 42(2) against Gibson and her counsel and award Ada County just damages.

Respectfully submitted,

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September 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY A. GIBSON, Plaintiff,	)	
vs.	)	Case No. CV05-263-S-EJL
ADA COUNTY, et al,	)	ORDER
Defendants.	)	

Pending before the Court in the above-entitled matter are Plaintiff Stacy A. Gibson's motion to alter or amend judgment, motion to amend motion for summary judgment, motion to amend pleadings, and other related filings. Defendants have responded to the motions and the time for filing a reply has expired. The matter is ripe for the Court's review.

Standard on Reconsideration

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider. However, the Ninth Circuit has stated that motions to reconsider should be treated as motions to alter or amend under Federal Rule of Civil Procedure 59(e). *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984). The scope and purpose of such a motion have been analyzed as follows:

> Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. (Citations omitted). These motions cannot be used to raise arguments which

> could, and should have been made before the judgment issued. (Citations omitted). Moreover they cannot be used to argue a case under a new legal theory. (Citations omitted).

Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986);

> Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.
>
> . . .
>
> [A] rehash of the arguments previously presented affords no basis for a revision of the Court's order.

Illinois Central Gulf Railroad Company, v. Tabor Grain Company, 488 F.Supp. 110, 122 (N.D. Ill. 1980). Where Rule 59(e) motions are merely being pursued "as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under Rule 59(e)" and must therefore be dismissed. *Davis v. Lukhard*, 106 F.R.D. 317, 318 (E.D. Va. 1984). *See also*, *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) ("Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought – rightly or wrongly."). The Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent

manifest injustice. *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994). Upon demonstration of one of these three grounds, the movant must then come forward with "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996).

Federal Rule of Civil Procedure 60(b)(6), states:

> On motion and upon such terms as are just, the court *may* relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6) (emphasis added). The Ninth Circuit has held that a party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002) (citing *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971) (per curiam); *see also Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). The party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion *Id.*, 282 F.3d at 1167 (citing *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Clause 60(b)(6) is a "catch-all" clause that is read as being exclusive of the other grounds for relief listed in Rule 60. *Id.* at n. 8 (citing *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986)).

Discussion

On February 28, 2006 the Court entered an order granting in part and denying in part Defendants' motion to dismiss. (Dkt. No. 34). The Court dismissed all of Plaintiff's claims and denied Defendants' request for attorney fees and entered judgment in favor of Defendants. (Dkt. No. 35). The following day Plaintiff filed the instant motions and related documents. (Dkt. Nos. 36-43, 46).

1) Motions to Alter or Amend:

The motion to alter or amend judgment and motion to amend asks the Court to vacate the judgment and allow Plaintiff to amend her pleadings and amend her motion for summary judgment and supporting materials, and file an amended response to defendants' motion to dismiss. Plaintiff subsequently filed an amended complaint and the requested amended memorandums. The filings are premised upon the same facts, arguments, and evidence as previously presented to the Court. Plaintiff has failed to point to any newly discovered evidence, clear error, or cite to a change in the applicable law. Accordingly, the Court denies the motion to alter or amend judgment and motion to amend summary judgment. As to the motion for relief pursuant to Rule 60(b), the Plaintiff has likewise failed to prove such relief is warranted.

Plaintiff's request to amend the pleadings is untimely. Judgment has been entered in this matter. Although Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires," "[l]iberality in granting a plaintiff leave to amend is subject to the qualification that the amendment

not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile. Additionally, the district court may consider the factor of undue delay." *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999) (citation omitted). Allowing an amended complaint at this stage in the proceedings is both futile and prejudicial to Defendants.

2) Defendants' Request for Costs and Attorney Fees:

Defendants have again requested that the Court award costs and attorney fees arguing the post-judgment filings are improper, frivolous, unreasonable, and a misuse of the judicial process requiring Defendants to incur further expenses. The Court previously denied Defendants' request for costs and attorney fees on the grounds that Plaintiff's claim was brought before this Court in good faith and upon the belief that the claim was a new cause of action under § 1983. (Dkt. No. 34). While that may have been true at the time, the instant motions and filings are wholly frivolous and without support in fact or law.

In a § 1983 action, attorney fees are awarded to a prevailing defendant pursuant to 42 U.S.C. § 1988(b) only "unreasonable, frivolous, merciless, or vexatious." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994). As the Court previously stated in its order granting the motion to dismiss the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive . . . [i]n setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard." In *Christiansburg Garment Co.*, the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation

> to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22. The Plaintiff's post-judgment filings here are entirely unreasonable and Defendants are entitled to and hereby awarded costs and attorney fees incurred as a result of the post-judgment filings by Plaintiff.

ORDER

Based on the foregoing and being fully advised in the premises, Plaintiff's motions (Dkt. Nos. 36 and 38) are **DENIED**. Defendants are awarded costs and attorney fees incurred in responding to the post-judgment filings by Plaintiff.

DATED: **June 6, 2006**

[SEAL] /s/ Edward J. Lodge
Honorable Edward J. Lodge
U. S. District Judge